

STATE OF MICHIGAN
COURT OF APPEALS

SANIT-AIR, INC., and THOMAS K. MORBACH,

Plaintiffs-Appellants,

v

SAFETY KING, INC., and MICHAEL S.
PALAZZOLO,

Defendants-Appellees.

UNPUBLISHED

November 30, 1999

No. 203852

Oakland Circuit Court

LC No. 96-531551 CZ

SANIT-AIR, INC.,

Plaintiff-Appellant,

and

DONALD J. MORBACH,

Appellant,

v

SAFETY KING, INC., and MICHAEL S.
PALAZZOLO,

Defendants-Appellees.

No. 214956

Oakland Circuit Court

LC No. 96-517631 CZ

Before: O’Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

These cases have been consolidated on appeal. In Docket No. 214956, plaintiff and its counsel appeal as of right from the trial court’s order granting summary disposition to defendants, MCR

2.116(C)(10), and imposing sanctions, MCR 2.114. In Docket No. 203852, plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants, MCR 2.116(C)(10), and imposing sanctions, MCR 2.114. We affirm.

In Docket No. 214956, plaintiff Sanit-Air, Inc. argues that the trial court erred in granting summary disposition of its defamation claim arising from defendant Palazzolo's March 15, 1996, conversation with plaintiff's potential customer.¹ Plaintiff contends that its affidavits establish an issue of fact regarding the claim. There is no merit to this claim. To establish a claim of defamation, a plaintiff must show:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998).]

Here, the affidavits are insufficient evidence of the content of Palazzolo's conversation with plaintiff's prospective customer. Because neither affidavit was based on the affiant's personal knowledge, the affidavits are not sufficient to oppose defendants' motion for summary disposition. MCR 2.119(B)(1)(a). There is no other evidence supporting a claim of defamation. Consequently, plaintiff's claim fails as a matter of law.

Plaintiff and appellant Donald Morbach also argue that the trial court erred in finding plaintiff's claims frivolous and in imposing sanctions pursuant to MCR 2.114. We disagree. The parties' adversarial relationship as direct competitors and the lack of evidence supporting plaintiff's claims below support the trial court's finding that plaintiff's defamation, breach of warranty, and tortious interference with a business relationship claims were frivolous. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996). The record shows that plaintiffs brought numerous motions and that the trial court referred to some of the resultant proceedings as "absolutely irrelevant and a total waste of time." The trial court characterized the underlying action as a "vendetta," with "all the aspects of abuse." The trial court held a hearing to determine reasonable attorneys' fees and defendants' counsel asserted that defendants incurred total attorneys' fees of \$46,813.75 and total costs of \$8,872.17. We find no abuse of discretion in the award of \$31,957.92 in sanctions against plaintiff and Donald Morbach.

In Docket No. 203852, plaintiffs Sanit-Air, Inc. and Thomas K. Morbach argue that the trial court erred in dismissing their invasion of privacy claim, which was premised on the misappropriation of Thomas Morbach's name for a commercial advantage. We agree.

The trial court based its dismissal on principles of res judicata. The applicability of res judicata is a question of law which is reviewed de novo on appeal. *Bergerson v Bush (After Remand)*, 228 Mich App 618, 620; 579 NW2d 124 (1998). Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior

action. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997). If different facts or proofs would be required to resolve a second action, res judicata does not apply. *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464; 432 NW2d 338 (1988).

In the present case, plaintiffs' invasion of privacy claim could not have been resolved by the same proofs as plaintiff Sanit-Air's prior claim, which alleged breach of warranty, tortious interference with a business relationship, and defamation. Plaintiffs' prior-filed action arose in part from a conversation between one of plaintiffs' potential customers and defendant Palazzolo, in which defendant allegedly defamed plaintiffs. Plaintiffs' claim also arose in part from defendant's sale of a truck and equipment to plaintiffs. Plaintiffs' invasion of privacy claim, on the other hand, arose from defendants' publication and distribution of advertisement brochures containing a statement attributed to plaintiff Thomas Morbach. Because the two suits required different proofs, res judicata did not bar plaintiffs' later filing of the invasion of privacy claim. Nonetheless, reversal is not required because the trial court reached the right result, albeit for the wrong reason. *Yerkovich v AAA*, 231 Mich App 54, 68; 585 NW2d 318 (1998).

Summary disposition of plaintiffs' invasion of privacy claim was proper because plaintiffs failed to introduce sufficient evidence to establish an issue of fact as to whether defendants misappropriated Thomas Morbach's name for a commercial advantage. There is no evidence that defendants used Thomas Morbach's name within the brochure because of a likelihood that use of his name along with the statement would lead to a commercial advantage. The only evidence on this issue suggests that eighteen brochures were distributed in Chicago. Thomas Morbach's business community is in Michigan. Furthermore, there is no proof that plaintiff suffered damages as a result of the publication and distribution of the brochure. Thomas Morbach admitted at deposition that he did not know of any damage suffered as a result of the brochures. Evidence of damages is necessary to sustain any tort claim. *Lumley v U of M Bd of Regents*, 215 Mich App 125, 130; 544 NW2d 692 (1996).

Next, plaintiffs argue that the trial court abused its discretion in denying plaintiffs' request to amend their complaint to include a claim of mental anguish on plaintiff Thomas Morbach's behalf and a claim of interference with a business relationship on plaintiff Sanit-Air's behalf. Decisions granting or denying motions to amend pleadings are within the sound discretion of the trial court and will not be overturned absent a clear abuse of discretion which resulted in injustice. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). We find no abuse of discretion here.

Plaintiffs also argue that the trial court erred in finding plaintiffs' claim frivolous and in imposing sanctions pursuant to MCR 2.114. We disagree. A trial court's finding that a claim or defense was frivolous will not be reversed on appeal unless clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A claim or defense is frivolous when: (1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a); *Cvengros, supra* at 266-267.

In the present case, the parties were direct competitors in the air duct cleaning business and there was evidence suggesting that defendants' refusal to sell their business to plaintiffs resulted in

plaintiffs having ill feelings toward defendants. Plaintiffs filed an invasion of privacy action with no evidence to support it. Therefore, the trial court did not clearly err in finding that plaintiffs' claims were frivolous because they were filed for the purpose of harassing defendants and were not grounded in fact or law. The trial court reviewed affidavits submitted by defendants' counsel indicating that they billed defendants \$7,700 in attorneys' fees and \$855.54 in costs in connection to defending plaintiffs' invasion of privacy claim. We find no abuse of discretion in the trial court's award of \$8,555.54 in sanctions.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Brian K. Zahra

¹ Plaintiff does not challenge the trial court's dismissal of its breach of warranty claim.